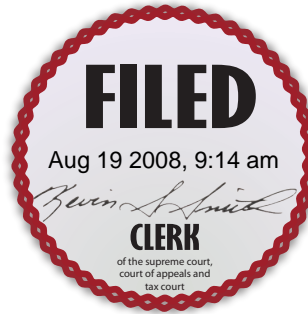


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JEROBOAM N. WILSON, JR.,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 34A04-0802-CR-00044

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable William C. Menges, Jr.
Cause No. 34D01-0609-FA-794

August 19, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Jeroboam N. Wilson, Jr., appeals his convictions for Dealing in Cocaine,¹ a class A felony, Possession of Cocaine within 1000 Feet of School Property,² a class A felony, and False Informing,³ a class B misdemeanor. Specifically, Wilson claims that his convictions must be reversed because the trial court erred in excluding evidence of a traffic stop and a police raid of a residence that were conducted months after the instant crimes occurred. Wilson also contends that his proposed jury instruction regarding the delivery of cocaine was improperly refused and that the evidence was insufficient to support his convictions for cocaine dealing and possession. Although we find that Wilson does not prevail on his claims of error, we sua sponte observe that possession of cocaine is a lesser included offense of dealing in cocaine. Therefore, we affirm in part, reverse in part, and remand with instructions that the trial court vacate Wilson's conviction and sentence for possession of cocaine.

FACTS

On September 28, 2006, Kokomo police officers Gary Taylor and James Lushin were investigating complaints of a black male dealing cocaine on a street corner. At some point during the investigation, the officers encountered Benavi Green, a known drug dealer, at the location. Although Green initially fled from the officers, he was apprehended after a brief chase.

¹ Ind. Code § 35-48-4-1.

² I.C. §§ 35-48-4-6(a), -6(b)(3).

³ Ind. Code § 35-44-2-2.

Thereafter, the officers requested that Green make a telephone call to an individual named “Jerry,” who was subsequently identified as Wilson, and purchase cocaine from him. Tr. p. 44. The officers instructed Green to buy enough cocaine to prevent Wilson from swallowing it if a traffic stop was made. Following this conversation, Green “ordered” four eight-balls, each weighing approximately three to three and one-half grams, and told Wilson to deliver the drugs to his house. Id. at 45, 47. Although the officers were not sure where Wilson resided, they had information concerning drug sales from a certain residence in the neighborhood. Consequently, surveillance officers maintained positions in that area.

After Green made the telephone call, the police officers observed Wilson and a female companion exit a residence, enter a green Cadillac, and drive away. The surveillance police informed Officers Taylor and Lushin of the activity. After determining a likely route that Wilson might take to Green’s residence, the officers observed Wilson’s vehicle approach from the opposite direction. At some point, they observed Wilson swerve into the opposite lane of traffic. As the officers followed, they observed Wilson change lanes without signaling. At that point, Officer Lushin activated the police cruiser’s emergency lights and stopped Wilson’s vehicle near the St. Patrick church and school.

As Officer Taylor approached, he observed the female passenger moving inside of Wilson’s vehicle and bend down out of sight in the front seat. When Officer Taylor moved closer, the passenger sat up in the seat. Officer Taylor noticed that the passenger’s belt and pants were undone, and also observed an empty plastic baggie with the corner torn off lying

on the passenger-side floorboard. In light of these circumstances, Officer Taylor suspected that the female passenger had concealed something on her person.

Wilson identified himself as “Andrew Wilson,” and the passenger told the officers that her name was Shaute Franklin. Id. at 51. Thereafter, the officers requested a drug- sniffing K-9 unit and when it arrived, it “alerted” to the presence of controlled substances in the vehicle. Id. at 14-16, 51-52. After removing Wilson and Franklin from the car, the officers searched them and found nothing. However, Officer Taylor observed Franklin place her hands down the front of her pants. As a result, a female officer was called to the scene. Officer Melissa Titus conducted a more intimate search of Franklin and, at some point, Franklin admitted that she had placed an item in her vagina. Thereafter, Franklin was transported to the hospital emergency room where a doctor removed a plastic bag from Franklin’s vagina that contained four smaller baggies. Each of the small bags contained a white, powdery, rock-like substance.

Franklin told Officer Lushin that Wilson had handed her the plastic baggie as the police began to follow his vehicle. Fearing that the police would believe that the baggie was hers, Franklin stated that she inserted the bag into her vagina to conceal it. Following this conversation, the police officers arrested Wilson.

As Wilson was being transported to the jail, he again told the officers that his first name was Andrew. When he arrived at the jail, Officer Taylor telephoned Wilson’s father in an attempt to verify Wilson’s identity. After Officer Taylor told Wilson of the conversation that he had had with Wilson’s father, Wilson changed his story, gave his correct name, date

of birth, and social security number. During the course of a search at the jail, Officer Taylor recovered \$945 from Wilson's pockets.

The contents of the baggies were field-tested, revealing the presence of cocaine. Further testing at the Indiana State Police laboratory confirmed that the substance was cocaine, with an aggregate weight of 12.97 grams. It was also determined that Wilson was stopped within 1000 feet of St. Patrick's School. School was in session and children were present when the stop occurred.

Wilson was charged with the above offenses, and a jury trial commenced on November 20, 2007. At some point during the trial, Wilson attempted to cross-examine Officer Taylor regarding a different traffic stop involving Wilson that had occurred on December 1, 2006. The trial court sustained the State's objection on the grounds that such evidence was not relevant. In response, Wilson's counsel made an offer to prove and argued that Officer Taylor's anticipated testimony would establish that Wilson "was pulled over without cause, without reason, not ticketed but he was searched, his vehicle was searched, nothing was found and then he was released. . . . That the officers . . . said they were going to get him." Id. at 90.

Wilson also attempted to question Officer Taylor during his case-in-chief about a drug raid that was conducted ten days after the stop leading to the instant offenses. The trial court again sustained the State's objection on relevancy grounds, and Wilson's counsel made an offer to prove, stating that the evidence would demonstrate that the residence that was later searched was not Wilson's. The trial court observed that "it doesn't matter what residence

this started at.” Id. at 169. Moreover, the trial court pointed out that Wilson’s counsel was only speculating with regard to “something that happened well after this particular traffic stop. What happened after this arrest is totally irrelevant.” Id. at 171.

Following the presentation of the evidence, Wilson tendered the following instruction, which the trial court refused:

I.C. 35-48-4-16(a), (b), and (c) state:

For an offense under this chapter that requires proof of:

(3) delivery of cocaine . . . within one thousand (1000) feet of . . . school property . . .

(b) It is a defense for a person charged under this chapter with an offense that contains an element listed in subsection (a) that:

(1) a person was briefly in, on, or within one thousand (1000) feet of school property . . .

and

(2) no person under the age of eighteen (18) years of age at least three (3) years junior to the person was in, on, or within one thousand (1000) feet of the school property . . . , at the time of the offense.

(c) It is a defense for a person charged under this chapter with an offense that contains an element listed in subsection (a) that the person was in, on or within one thousand (1000) feet of the school property . . . at the request or suggestion of a law enforcement officer or an agent of a law enforcement officer.

Appellant’s App. p. 74. Wilson was found guilty as charged, and on December 21, 2007, the trial court sentenced Wilson to thirty years of incarceration for cocaine possession with twenty-five years executed and five years suspended to probation. For dealing in cocaine, the trial court sentenced Wilson to thirty years of incarceration, twenty-five years executed,

with five years suspended to formal probation. The trial court also sentenced Wilson to 180 days of incarceration in the Howard County Jail on the false informing conviction. All sentences were ordered to run concurrently. Wilson now appeals.

DISCUSSION AND DECISION

I. Exclusion of Evidence

Wilson claims that his convictions must be reversed because the trial court improperly excluded evidence of the vehicle stop that occurred approximately two months after he committed the instant offenses, as well as the evidence concerning the subsequent police raid at the residence. Specifically, Wilson claims that the trial court's exclusion of this evidence precluded him from presenting a defense.

In resolving this issue, we initially observe that the admission or exclusion of evidence is within the sound discretion of the trial court and the determination regarding the admissibility of evidence is reviewed only for an abuse of discretion. Wilson v. State, 765 N.E.2d 1265, 1272 (Ind. 2002). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. Id. We also note that relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ind. Evidence Rule 401. The two components of relevant evidence are materiality and probative value. If the evidence is offered to help prove a proposition that is not a matter in issue, the evidence is immaterial. Kubsch v. State, 784 N.E.2d 905, 924 (Ind. 2003). Additionally, where the probative value

of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, or needless presentation of cumulative evidence, the evidence should be excluded. Evid. R. 403. The trial court has wide latitude in weighing the probative value of the evidence against the possible prejudice of its admission. Sanders v. State, 704 N.E.2d 119, 123 (Ind. 1999).

As Wilson points out, a criminal defendant is guaranteed a meaningful opportunity to present a complete defense. Kubsch, 784 N.E.2d at 924-25. More particularly, the United States Supreme Court has observed that

[t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14, 19 (1967). Notwithstanding the above, we note that although every defendant has the fundamental right to present witnesses in his or her own defense, that right is not absolute. Roach v. State, 695 N.E.2d 934, 939 (Ind. 1998). Moreover, a defendant's right to cross-examine the State's witnesses is subject to reasonable limitations placed at the discretion of the trial court. Smith v. State, 721 N.E.2d 213, 219 (Ind. 1999). More particularly, "trial judges retain wide latitude . . . to impose reasonable limits . . . based on concerns about, among other things, harassment, prejudice, confusion of issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Marcum v. State, 725 N.E.2d 852, 860 (Ind. 2000).

With regard to the excluded evidence that pertained to the traffic stop on December 1, 2006, Wilson has failed to show that such evidence may have disproved any fact regarding the charged offenses. Moreover, Wilson's proffered evidence was remote from the circumstances that pertained to the instant offenses. Similarly, the evidence regarding the subsequent drug raid at the residence would not have disproved Wilson's commission of the offenses that were charged. In essence, the trial court's exclusion of the evidence in both instances prevented Wilson from injecting confusing and possibly prejudicial evidence into the trial and placing it before the jury. In our view, any evidentiary link between the proffered evidence and Wilson's crimes were tenuous at best, and the proposed evidence did not negate any element of the charged offenses. Thus, the trial court did not err in excluding this evidence.

II. Refused Instruction

Wilson argues that the trial court erred in refusing to give the tendered instruction set forth above regarding the elements of the offenses because the evidence at trial supported the giving of the instruction. More specifically, Wilson contends that his rights were substantially prejudiced because the trial court's refusal to give the instruction precluded him from presenting his defense.

In resolving this issue, we note that instructing the jury is within the trial court's discretion and we review the refusal to give a tendered instruction for an abuse of discretion. Springer v. State, 798 N.E.2d 431, 433 (Ind. 2003). Jury instructions are to be considered as a whole and in reference to each other, and an error in a particular instruction will not result

in reversal unless the instructions misstate the law or mislead the jury as to the law in the case. Stringer v. State, 853 N.E.2d 543, 548 (Ind. Ct. App. 2006).

In determining whether an instruction was properly refused, this court considers whether: (1) the instruction correctly stated the law; (2) there was evidence in the record that supported the giving of the instruction; and (3) the substance of the tendered instruction was covered by other instructions that were given. Springer, 798 N.E.2d at 433. Errors in the giving or refusing of instructions are harmless where a conviction is clearly sustained by the evidence and the instruction would not likely have impacted the jury's verdict. Ray v. State, 846 N.E.2d 1064, 1070 (Ind. Ct. App. 2006), trans. denied. Finally, an instruction error will result in reversal "when we cannot say with complete confidence that a reasonable jury would have rendered a guilty verdict had the instruction been given." Filice v. State, 886 N.E.2d 24, 37 (Ind. Ct. App. 2008), trans. denied.

In this case, the evidence established that the police stopped Wilson on September 28, 2006, near St. Patrick's school for traffic infractions. Although the police did not follow Wilson's vehicle until it was within 1000 feet of the school, they stopped it as soon as they observed Wilson commit the traffic violations. Tr. p. 43, 48-49. The State also established that school was in session and students were on the premises when Wilson was stopped. Id. at 155. Thus, because Wilson did not contradict or deny that evidence, we conclude that the trial court properly refused that portion of the instruction regarding the defense to a defendant's delivery of cocaine within 1000 feet of school property.

We further note that Indiana Code section 35-48-4-16(c), which is also a part of

Wilson's tendered instruction, makes it a defense for a person charged with an offense that contains the element that the person was in, on, or within 1000 feet of school property "at the request or suggestion of a law enforcement officer or an agent of a law enforcement officer."

Contrary to Wilson's claim, the evidence does not establish that any law enforcement agent made any suggestion concerning Wilson's route with regard to the delivery of the cocaine. Indeed, the evidence demonstrated that the officers instructed Green to order enough cocaine that Wilson could not swallow it if apprehended. Id. at 44-45. There is no showing that the officers urged Green to instruct Wilson to use a particular route to bring the cocaine to Green's location, and the police did not know Wilson's address. Id. at 45.

When the police discovered that drug activity was occurring at a particular residence, the officers surveilled the area before Green contacted Wilson. When Wilson and Franklin left the residence after the telephone call, the surveillance officers alerted Officers Taylor and Lushin of their departure. Id. at 46-47. At that point, the officers attempted to figure out Wilson's most likely route so they could wait for his approach. Id. at 47. Moreover, the evidence established that the officers immediately stopped Wilson's vehicle after observing him commit the traffic violations. Id. at 48-49.

In sum, no evidence was presented suggesting that the officers maneuvered Wilson in such a manner that he went within 1000 feet of the school, and no reasonable person would infer that the officers set Wilson up to be apprehended in that location. To do so, the officers would also have to ensure that Wilson committed a traffic violation and further ensure that he would be stopped within 1000 feet of the school. For all of these reasons, we conclude that

the trial court properly refused Wilson's tendered instruction.

III. Sufficiency of the Evidence

Finally, Wilson argues that the evidence was insufficient to support his convictions for dealing in cocaine and possession of cocaine. Specifically, Wilson maintains that the evidence presented to establish his guilt was only "speculative" because Franklin was intoxicated at the time of the stop and she had only had a few hours of sleep. Appellant's Br. p. 12. In essence, Wilson contends that Franklin was not a credible witness.

In reviewing a challenge to the sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). Moreover, we respect the jury's exclusive province to weigh conflicting evidence. Id. And the jury is free to believe or disbelieve witnesses as it sees fit. McClendon v. State, 671 N.E.2d 486, 488 (Ind. Ct. App. 1996). We will affirm if the probative evidence and reasonable inferences drawn therefrom could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. McHenry, 820 N.E.2d at 126. Finally, the uncorroborated testimony of one witness is sufficient to sustain a conviction. Carter v. State, 754 N.E.2d 877, 880 (Ind. 2001).

To convict Wilson of class A felony dealing in cocaine, the State was required to prove that he (1) knowingly or intentionally; (2) delivered; (3) cocaine; (4) to another person; (5) in an amount weighing three grams or more. I.C. § 35-48-4-1(a)(1)(C)(b)(1). Evidence of the illegal possession of a relatively large quantity of drugs is sufficient to sustain a conviction for possession with the intent to deliver. Beverly v. State, 543 N.E.2d 1111, 1115 (Ind.

1989). Moreover, the more narcotics a person possesses, the stronger the inference that he intended to deliver the narcotics and not personally consume them. Love v. State, 741 N.E.2d 789, 792 (Ind. Ct. App. 2001). To convict Wilson of possession of cocaine as a class A felony, the State was required to prove that he (1) knowingly or intentionally; (2) possessed: (3) cocaine; (4) in the amount of three grams or more; (5) within 1000 feet of; (6) school property. I.C. § 35-48-4-6(a)(b)(3)(B)(i).

In this case, Franklin testified at trial that she believed that Wilson was going to take her to a friend's house to retrieve her vehicle. Tr. p. 102-03, 113. However, when the police officers stopped Wilson's car, Wilson handed Franklin a baggie containing a white rock-like substance and told her to take it. Id. at 105, 107, 113. A chemist at the Indiana State Police laboratory analyzed the substance contained in each bag and determined that the bags contained cocaine base with an aggregate weight of 12.97 grams. We find that this was sufficient evidence to support Wilson's convictions.

While Wilson maintains that his convictions must be set aside because Franklin was not a credible witness, such an argument amounts to a request for us to reweigh the evidence and rejudge the credibility of the witnesses, which we cannot do. McHenry, 820 N.E.2d at 126-27. The jury was the trier of fact and was entitled to determine which version of the incident to credit. Barton v. State, 490 N.E.2d 317, 318 (Ind. 1986). As a result, Wilson's challenge to the sufficiency of the evidence fails.

IV. Double Jeopardy Concerns

Finally, notwithstanding our conclusion that the evidence was sufficient, we observe

sua sponte that possession of cocaine is a lesser-included offense of dealing in cocaine. Hardister v. State, 849 N.E.2d 563, 576 (Ind. 2006). In accordance with Indiana Code section 35-38-1-6, where a defendant is found guilty of both a greater and a lesser-included offense, judgment and sentence may not be entered on the lesser-included offense. An offense is inherently included in another offense if the lesser offense may be established “by proof of the same material elements or less than all the material elements defining the “greater” offense charged. I.C. § 35-41-1-16(1).

In this case, the informations charging Wilson with the commission of these two offenses provided as follows:

[o]n or about September 28, 2006 at or near Washington Street, Kokomo in Howard County, . . . Wilson did possess cocaine in the aggregate weight of at least 3 grams, said possession occurring within one thousand (1000) feet of school property. . . .

[o]n or about September 28, 2006, at or near Washington Street, Kokomo in Howard County, . . . Wilson did knowingly deliver cocaine, said cocaine having a weight of three (3) grams or more. . . .

Appellant’s App. p. 13-14.

In examining the above, and considering the evidence that was presented at trial, it is apparent that the same cocaine was used to prove both possession and dealing. Therefore, Wilson’s conviction and sentence for the possession offense must be vacated. See Hardister, 849 N.E.2d at 576 (holding that “ simple possession of cocaine is . . . a lesser included offense of dealing as a B felony . . . and both are lesser included offenses of Class A dealing”).

The judgment is affirmed in part, reversed in part, and this cause is remanded with instructions that the trial court vacate Wilson's conviction and sentence for possession of cocaine.

MATHIAS, J., and BROWN, J., concur.